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Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

BRIEF AMICI CURIAE OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, THE NATIONAL CONGRESS OF AMERICAN INDIANS, et al., IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are nine federally-recognized Indian tribes and one national Indian organization. Amici have a substantial interest in the issues raised in this case. The issues involve the right of Indian tribes and their members to be free from state taxing jurisdiction over sales of motor fuel and tribal members' income.

Some amici currently sell fuel to members and non-members in Indian country while others are planning fuel operations for the future. Also, some amici employ tribal members within Indian country while those members live outside of Indian country. All amici exercise their sovereign authority over their Indian lands, including commercial activities occurring on those lands.

Amici vehemently oppose the State's attempt to exercise jurisdiction over tribal fuel sales within Indian country and its taxation of tribal members working for the Tribe within Indian country. Such exercise of State taxing jurisdiction significantly threatens the inherent rights of all Indian tribes to be self-governing and free from State jurisdiction within Indian country.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent, the Chickasaw Nation ("the Tribe"), currently owns and operates convenience stores on tribal trust land from which they sell motor fuel. The Petitioner, Oklahoma Tax Commission ("the State"), seeks to tax those sales. The State also seeks to tax the income of tribal members who work for the Tribe on tribal trust land but live outside of Indian country. The Court of Appeals struck down both taxes and its holding should be affirmed.

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[1] Counsel for Petitioner and Counsel for respondent both consent to the filing of the Brief of *Amici*. Their letters are submitted for filing herewith.

In its brief on the merits, the State argues that the Hayden-Cartwright Act, 4 U.S.C. § 104 "expressly authorizes state taxation of motor fuel sales on federal reservations, including Indian reservations." Pet. Br. at 14. This argument was not presented to either court below, nor was it passed on by them. This argument is not properly before the Court and should not be considered. Rather, the Court should dismiss certiorari as improvidently granted as to the motor fuels tax issue. Alternatively, the Court should decide the issue without reference to the Act.

Should the Court nevertheless reach the Act, it should find that the Act does not indicate an unmistakably clear Congressional intent to abrogate Indian tax immunity; moreover, the relevant legislative history and the canons of construction lead to the conclusion that there is no State authority to tax under the Act.

Absent clear Congressional authorization in the Hayden-Cartwright Act to impose the motor fuel taxes, principles of federal preemption preclude the states from imposing such taxes where the legal incidence falls on either the tribe or the Indian consumer. There is in fact, a *per se* rule against the imposition of such taxes. In addition, the imposition of such taxes would infringe on the right to tribal self-government.

Assuming *arguendo* that the Act does apply to Indian reservations, its only effect is to codify existing law that on-reservation sales by non-Indian traders to non-Indians are taxable.

The same principles of federal preemption and tribal sovereignty preclude the imposition of a state income tax on the income of enrolled tribal members who earn their income working for the Tribe in carrying out its sovereign functions within Indian country even though these members reside outside of Indian country.

ARGUMENT

I. BECAUSE THE HAYDEN-CARTWRIGHT ACT WAS NOT RAISED OR PASSED ON BELOW THE COURT SHOULD DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED ON THE MOTOR FUEL TAX ISSUE; ALTERNATIVELY, THE COURT SHOULD DECLINE TO CONSIDER THE ACT IN REACHING ITS DECISION

In its brief on the merits, the State argues that the Hayden-Cartwright Act, 4 U.S.C § 104, ("the Act") "expressly authorizes state taxation of motor fuel sales on federal reservations, including Indian reservations." Pet. Br. at 14. The State did not argue or brief the Act to the District Court or to the Court of Appeals. And, neither lower court ruled on the Act.[2] Nor did the State raise the Act in its petition for certiorari.

This Court will ordinarily not consider an issue not raised or passed on below. *Duignan v. United States*, 274 U.S. 195 (1927); *Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987). Only the most "extraordinary," "unusual," or "exceptional" circumstances will warrant review where a party has failed to raise an issue below. *Taylor v. Freeland and Kronz*, 503 U.S. 638, 112 S.Ct. 1644 (1992); *Equal Employment Comm'n v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986); *Yee v. Escondido*, 503 U.S. 519, 112 S.Ct. 1522 (1992).

Here the State presents no "extraordinary", "unusual" or "exceptional" circumstances that would explain its failure to preserve the Hayden-Cartwright Act issue. The only explanation the State gives for not raising the Act is that during the entire course of this litigation it

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[2] The Court of Appeals stated *sua sponte* that "the issue was not raised" and that it would "express no opinion on it." Chickasaw Nation v. State of Oklahoma ex rel. Oklahoma Tax Comm'n, 31 F.3d 964, 972 n.4 (10th Cir. 1994) (No. 92-7117).

was of the view that "the relevant boundary for taxing jurisdiction [was] the perimeter of a formal reservation, not merely land set aside for a tribe or its members." Pet. Br. at 24. The State maintains that this Court's decision in *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S.Ct. 1985 (1993) first put it on notice that the Act might be applicable to the lands involved in this case. This argument is unconvincing for several reasons.

First, in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi*, 498 U.S. 505, 511 (1991), this Court had already explicitly told the State that the relevant boundary for jurisdictional purposes was any land "validly set apart for the use of the Indians. . . . " *Potawatomi* was decided in February 1991, one year before the State filed its brief in support of summary judgment in the District Court in the present case.

Second, in its brief to the Court of Appeals, the State treated Indian country as if it were the equivalent of formal reservation lands. *See* Appellee's Answer Brief at pp. 10-15, *Chickasaw Nation v. State of Oklahoma, ex rel Oklahoma Tax Commission*, 31 F.3d 964 (10th Cir. 1994) (No. 92-7117). That is directly contrary to its assertion now. Pet. Br. at 24 n.11.

Finally, *Oklahoma Tax Comm'n v. Sac and Fox Nation*, itself, was decided well before the petition for certiorari was filed. Thus the State has no good reason for waiting until its brief on the merits to first raise the Hayden-Cartwright Act.

Because the State failed to raise and preserve the Hayden-Cartwright Act issue, this Court should dismiss certiorari as improvidently granted. Dismissal is particularly warranted where, as here, a "central issu[e] on which resolution of the question presented may well turn cannot be reached or resolved" because of a petitioner's failure to raise it below, and lack of a sufficient excuse for not doing so. *Equal Employment Opportunity Comm'n v. Fed. Labor Relations Auth.*, 476 U.S. 19 (1986). Dismissal is

appropriate in such a situation because, by raising an issue for the first time after certiorari has been granted, the petitioner alters the situation as originally apprehended by the Court when it granted certiorari. *See* Sheldon R. Shapiro, *When Will Supreme Court Dismiss Writ of Certiorari as Improvidently Granted*, 30 L.Ed.2d 829. Because the Court was not informed of the Hayden-Cartwright Act argument before it granted certiorari, it should dismiss certiorari as improvidently granted on the motor fuel tax issue.

Alternatively, if the Court decides to reach the merits of the State's motor fuel taxing jurisdiction it should do so without considering the applicability of the Hayden-Cartwright Act.[3]

However, should this Court decide to reach the issue of the Hayden-Cartwright Act's applicability, it should find that the Act does not grant the State jurisdiction to tax in this instance.

II. THE HAYDEN-CARTWRIGHT ACT DOES NOT GRANT STATES JURISDICTION TO TAX MOTOR FUEL SALES ON INDIAN RESERVATIONS; AT LEAST IT DOES NOT ABROGATE INDIAN IMMUNITY FROM STATE TAXATION ON SUCH RESERVATIONS

The Hayden-Cartwright Act was first enacted in 1936 as section 10 of an Act to amend the Federal Highway Act. (Act of June 16, 1936, ch. 582, § 10, 49 Stat. 1519,

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[3] *See, e.g.*, Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644 (1992) (refusing to consider a different section of a code under review where raised for the first time in an opening brief on the merits); Air Courier Conf. v. Postal Workers, 498 U.S. 517 (1991) (declining to consider a statute's applicability where party failed to raise it before its brief in opposition to the petition for certiorari).

1522). While only a part of the original Hayden-Cartwright Act, section 10 itself is now popularly referred to as the Hayden-Cartwright Act. Section 10 was itself amended in 1940 by a section of the Buck Act (an Act permitting states to extend their sales, use, and income taxes to federal areas) (Act of Oct. 9, 1940, ch. 787, 54 Stat. 1059 (codified at 4 U.S.C. §§ 105-110). Finally, in 1947 it was codified, as amended at 4 U.S.C. § 104, where it is found today. The relevant portions of the Hayden-Cartwright Act provide:

> (a) All taxes levied by any State . . . upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States.
>
> (b) The officer in charge of such reservation shall . . . submit a written statement to the proper taxing authorities of the State . . . within whose boundaries the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable . . .

4 U.S.C § 104 (1952).

A. The Hayden-Cartwright Act Does Not Apply To Indian Reservations

1. On its face, the Hayden-Cartwright Act does not manifest unmistakably clear congressional intent to authorize state jurisdiction to tax tribal motor fuel sales on Indian reservations

Congress may authorize states to impose taxes on Indian tribes and individual Indians, however:

> [i]t has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so *unmistakably clear*.

Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985) (emphasis added); *See also Bryan v. Itasca County*, 426 U.S. 373 (1976).

Although the Hayden-Cartwright Act explicitly singles out "military reservations" – unmistakably evidencing Congress' intent to include those reservations in the terms of the Act – it does not specifically mention Indian reservations. Nor does it anywhere mention Indians or Indian tribes. The language thus falls far short of the unmistakably clear requirement. Hence, this Court should hold that the Act does not authorize state taxation of motor fuel sales on Indian reservations.

2. Assuming *arguendo* that the lack of unmistakably clear congressional authorization on the face of the Act is not dispositive, principles of statutory construction require a finding that the Act does not apply to Indian reservations

Special principles of construction govern the determination of the Act's applicability here because Indian rights are implicated. *Montana v. Blackfeet*, 471 U.S. 759, 766 (1985). In deference to Congress' trust responsibility toward Indians, this Court has developed canons of construction that favor preservation of Indian rights. These canons apply forcefully where ambiguous statutes are claimed to allow state taxing jurisdiction over Indian activities within Indian country. In such a situation, "doubtful expressions are to be resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S.

78, 89 (1918)). Hence, statutes are to be construed narrowly when Indian rights are to be abrogated or limited. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* 221-25 (1982 ed.). Amici will show that neither the language nor the legislative history of the Hayden-Cartwright Act manifests the requisite clarity of expression required by the canons that would support a finding that the State has taxing jurisdiction over Indians in this case.

a. The language in the Act strongly suggests that Indian reservations were not meant to be included in the scope of the Act

The scope of the Hayden-Cartwright Act's coverage is governed by the phrase "United States military or other reservations." This phrase is evocative of general governmental reservations having general governmental purposes carried out by governmental employees. However, it is ambiguous with regard to whether Indian reservations, which are created for the benefit of Indian people, not the government, and which are occupied by Indian people with the United States simply acting as a trustee, are included.

Other phrases in the Act also raise doubt that Indian reservations were included in the scope of the Act. For example, the grant of taxing jurisdiction under the Act only applies "when such fuels are not for the exclusive use of the United States." In other words, where the fuel is being used by the United States for official governmental purposes, the fuel is exempt from the tax. Had there been an intent to include Indian reservations, the same exemption would undoubtedly have been retained for use of fuel by Indian tribes in the conduct of their business. It is unthinkable that the United States would not have reserved to the impoverished tribes under its trust at least the same treatment as it did for itself.

Additionally, in section (b), the Act requires that certain tax reports be filed by "the officer in charge of such reservation . . . " a phrase which, once again fits general governmental reservations, but not an Indian reservation. Tribal officials are in charge of Indian reservations and they would be in no position to make such reports.

The only term which is at all suggestive of Indian reservations is the term "licensed traders." This term appears in a laundry list of establishments which might appear on a reservation. An Opinion of the Solicitor of the Department of the Interior, found that the reference to licensed traders gave only "slight" indication that Indian reservations were included within the Act.[4] Applying the canons of construction, the Act must be interpreted so as not to include Indian reservations.

b. The legislative history of the Hayden-Cartwright Act supports the conclusion that the Act was not meant to apply to Indian reservations

In *Bryan v. Itasca County, supra,* the issue was whether a statute which gave states civil jurisdiction over reservation

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[4] Amazingly, contrary to the canons of construction, the opinion then concluded that the Act applied – notwithstanding the fact that in 1912, this Court in Choate v. Trapp, acknowledged that special Indian "rule[s] of construction [have] been recognized, without exception for more than a hundred years, and [have] been applied in tax cases." 224 U.S. 665, 675 (1912). *See* The Kansas Indians, 72 U.S. (5 Wall) 737 (1867). Application of Federal and State Sales Taxes to Activities of Menominee Indian Mills, 57 Interior Dec. 129, 139 (1940). *See also* Opinion of the Attorney General, 38 Op. Atty. Gen. 522 (1936). Both opinions construed the statute *liberally* in favor of abrogating Indian rights. Because these opinions disregarded established canons of construction, their conclusions are facially invalid and should be disregarded. *See* Pittson Coal Group v. Sebben, 488 U.S. 105 (1988).

Indians, also gave states the authority to tax Indians. First, the Court reviewed the legislative history of the statute and found

> . . . the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations. . . . This omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress.

426 U.S. at 381 (1976) (footnotes omitted).

The Court then referred to other laws in which Congress had expressly authorized states to tax Indians, which the Court cited as "cogent proof" that if Congress intended to empower states to tax Indians, it " . . . knew well how to express its intent directly. . . . " *Id.* at 389. The Supreme Court's analysis in *Bryan* is directly relevant to the Hayden-Cartwright issue.

As with the act involved in *Bryan*, there is no reference to Indians or Indian reservations in the legislative history of the Hayden-Cartwright Act.[5] The language

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[5] Both the Attorney General's Opinion, 38 Op. Atty. Gen. 522 (1936) and the Interior Department Solicitor's Opinion, 57 Interior. Dec. 129 (1940), suggest that because other sections of the 1936 Act mention specific types of reservations – including Indian reservations – that Congress had in mind Indian reservations when it drafted section 10 (the provision now referred to as the Hayden-Cartwright Act). This inference is flawed, however. Section 10 was not part of the original Hayden-Cartwright bill (which dealt with road construction). The section 10 provision was an after-added provision. *See* Felix S. Cohen, Handbook of Federal Indian Law, 412 n. 62 for full discussion on the history of the Act's introduction. Thus, any intent demonstrated

only states that: " . . . there is complaint in many parts of the country about the inability of the States to collect revenue on gasoline sold on *Government* reservations not for governmental use." 80 Cong. Rec. 6913 (1936) (emphasis added). While members of Congress felt States should not be allowed to collect taxes where motor fuel was purchased on government reservations for the exclusive use of the United States, they felt that the privilege of tax exemption, "should not be extended to officials or employees when not in actual discharge of their official duties." *Id.*

This record verifies that the Act was meant to apply to general governmental reservations having general governmental purposes carried out by governmental employees and not Indian reservations which are distinguishable. Tribal members residing on their reservation are not officials or employees. Indian reservations were not created for the benefit of the federal government, but for the benefit of Indian people. Indian reservations are not owned outright by the United States, but are held in trust for Indian tribes. Furthermore, there is no evidence in the legislative history that Congress actually considered the conflict between the Hayden-Cartwright Act and Indian rights to be free from state taxation and "chose to resolve that conflict by abrogating [those rights]." *United States v. Dion*, 476 U.S. 734, 740 (1986).[6] The legislative

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by Congress in other sections of the 1936 Act is totally unrelated to any intent they may have had regarding section 10.

[6] The legislative history of the Buck Act, which should be read in *pari materia* with the Hayden-Cartwright Act supports the conclusion that Indian reservations were not meant to be included. *See, e.g.*, the letter from the acting Secretary of the Interior, E.K. Burlew, *infra*, at sec. II.B.2.b. of this Brief, which notes that the Buck Act was not meant to apply to transactions occurring within Indian reservations.

history thus supports the conclusion that Indian reservations are not included in the Act.

B. Assuming *Arguendo* That The Hayden-Cartwright Act Applies To Indian Reservations, It Does Not Abrogate Indian Immunity From Taxation

1. The reference in the Act to "licensed traders" does not manifest unmistakably clear intent to abrogate Indian immunity

First, the term "licensed traders" on its own does not satisfy the "unmistakably clear" rule. The mere reference to licensed traders does not manifest unmistakably clear congressional intent to abrogate Indian immunity from State taxation on Indian reservations. Furthermore, employing canons of construction applicable to Indian situations, leads to the conclusion that the term licensed trader should be limited so as not to include transactions involving Indians. The reference to "licensed traders," interpreted according to applicable canons of construction would at most, have codified existing law allowing taxation where non-Indian traders sell fuel to non-Indian consumers.[7] *See In the Matter of the State Motor Fuel Tax Liability of A.G.E. Corp.*, 273 N.W.2d 737 (S.Ct. S.D. 1978) (finding that the Hayden-Cartwright Act granted states "limited jurisdiction" to tax a non-Indian corporation engaged in highway construction on an Indian reservation). There is no indication that abrogation of Indian tax immunity was intended.

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[7] At the time the Hayden-Cartwright Act was enacted, state taxation over non-Indians on Indian reservations was allowed to the extent that the state taxation did not infringe on tribal sovereignty. *See* Utah & N.Ry. Co. v. Fisher, 116 U.S. 28 (1885); Thomas v. Gay, 169 U.S. 264 (1898). Thus, the licensed trader language at most codified existing law in this regard.

2. The legislative history of the Buck Act indicates that the Hayden-Cartwright Act was not meant to abrogate Indian immunity from taxation

a. Legislative history from the Buck Act should be applied to the Hayden-Cartwright Act

In the United States Code, the Hayden-Cartwright Act, 4 U.S.C. § 104, is followed by the Buck Act, 4 U.S.C. §§ 105-113. The Buck Act empowers states to impose sales tax and income tax on purchases made or incomes earned on federal installations. When introduced, the Buck Act was treated by Congress as the companion to the Hayden-Cartwright Act, which was limited to gasoline taxes. The Buck Act was viewed by Congress as an extension of that Act, expanding the principle to allow state sales and income taxes as well as gas taxes. This is made clear by the introductory remarks of the Committee chairman at the Senate hearings on the Buck Act. "[The original Buck Act bill is only an extension of the principles involved in that Act (Hayden-Cartwright)]." *Application of State Sales and Use Taxes to Transactions in Federal Areas: Hearings on H.R. 6687 Before the Subcomm. of the Comm. on Finance*, 76th Cong., 3rd Sess. 4 (1940) (hereinafter, "*Buck Act Hearings*") The original language of the Buck Act – the bill language that was before the Senate and House Committees when the legislative history was developed – was one paragraph that was almost identical to the language of the Hayden-Cartwright Act.[8] The additional

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[8] House Bill 6687 was introduced to:

authorize the levy of State, Territory, and District of Columbia taxes upon, with respect to, or measured by sales, purchases, or use of tangible personal property or upon sellers, purchasers, or users thereof occurring in United States national parks, military and other

sections now found in the Buck Act were not added until after the hearings. *See* 4 U.S.C. §§ 106-113.

Because the language of the two Acts was so similar, the extensive legislative history on the original Buck Act language serves effectively as the legislative history for the Hayden-Cartwright Act. Also, because Congress said it was applying the same principles to both Acts, the principles underlying the Buck Act provide insight on Congress' intent in regard to the Hayden-Cartwright Act.

While ordinarily, the legislative history of a subsequent law is not considered to be relevant to an interpretation of a prior law, in *Bryan v. Itasca County* this Court pointed out that there are exceptions to this principle, particularly in matters involving the tax immunity of Indians and particularly when, as here, the two laws are intimately related. 426 U.S. at 386. In such cases, it is appropriate to read the statutes *in pari materia* and to consider ambiguities in light of intervening legislative enactments. *See also Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

b. The Indian exemption found in the Buck Act should be applied to the Hayden-Cartwright Act

There is an explicit provision in the Buck Act exempting Indians from its scope. Section 5 of the Buck Act provided:

> Nothing in sections 1 and 2 of this Act shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.

54 Stat. 1059 (1940).

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reservations . . .

86 Cong. Rec. 200 (1940).

Evidence shows that Congress considered the original Buck Act language, which was virtually identical to the Hayden-Cartwright Act language, not to empower states to tax Indians and that the Indian exemption provision was added simply as a precaution. The acting Secretary of the Interior, E.K. Burlew, submitted a letter which evidenced the Department of Interior's concern that:

> We have been advised by the office of the Senate legislative counsel that it is not intended to apply to . . . transactions [within Indian reservations]. It is possible, however, that the bill, if enacted, may be construed otherwise by State taxing authorities and by State courts. If the bill were construed to apply to Indian reservations, it would probably be in violation of established constitutional and treaty rights of the Indians . . . . It certainly would be in contravention of the established departmental policy that transactions between Indians on Indian reservations should remain a matter of Federal rather than of State control.

Buck Act Hearings, supra, at 39. The Indian exemption provision was added in response to this testimony.

Clearly it would have been preferable if Congress had explictly applied the Indian exemption provision to the Hayden-Cartwright Act so as to eliminate any possibility of a state misinterpreting that Act. However, by reading the statutes *in pari materia,* as is appropriate here, any ambiguity regarding the Hayden-Cartwright Act's applicability to Indians can properly be resolved by applying the Buck Act exemption – particularly as there is no indication that Congress intentionally excluded the Hayden-Cartwright Act from the Indian exemption provision.[9]

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[9] Further indications that the Hayden-Cartwright Act should be read *in pari materia* with the Buck Act can be found in

3. The circumstances motivating Congress to authorize state taxing jurisdiction within certain federal reservations are completely inconsistent with a conclusion that Congress intended to empower states to tax Indians

A statute is to be construed in light of the circumstances existing at the time it was passed and in view of the evil sought to be corrected and prevented. *United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1950). The Buck Act legislative history clearly describes the circumstances that prompted Congress to enact the Buck Act. As indicated earlier, Congress specifically stated that these were the same circumstances that underlay the passage of the Hayden-Cartwright Act. A review of the legislative history shows that Congress intended to correct an existing situation by returning to states jurisdiction which they had relinquished to the federal government.

During a hearing on the House bill, the statement was made that:

> the states have been very generous in granting jurisdiction to the Federal government in areas they have ceded to the Government, and it

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the legislative history of the Buck Act. The Senate report stated that:

> the committee amendment amends . . . the Hayden-Cartwright Act *so that the authority granted to the states by such section [the Hayden-Cartwright Act] will more nearly conform to the authority granted to them under section 1* [of the Buck Act].

S.Rep. No. 1625, 76th Cong., 3rd Sess. 5 (1940) (emphasis added). Since the Hayden-Cartwright Act was meant to conform to section 1 of the Buck Act, it follows that the provision in the Buck Act exempting Indians from section 1's provisions should extend to the Hayden-Cartwright Act as well.

> seems . . . that the Federal Government ought not to put itself in the position where . . . it puts the citizens in a given state at a disadvantage as far as tax collections and payments are concerned.

Buck Act Hearings, supra, at 5.

This language clearly shows that Congress was just returning to the states that portion of jurisdiction necessary to cure the undesirable situation that had arisen as a result of their having ceded it. But since the states had no jurisdiction over Indians on Indian reservations to cede to the federal government, there was no jurisdiction to be returned to the states by the Hayden-Cartwright Act.[10]

Also, at the time the Buck Act was proposed, circumstances were such that Indians were not operating retail establishments. Thus, they could not have been contemplated as contributing to the problem Congress was addressing. A Representative from New Mexico testified that with respect to sales on Indian reservations, "the Indian does not run the store. The proprietors of the stores are whites, and not Indians. I do not recall a single

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[10] The source of federal jurisdiction over Indian reservations differs from the source of jurisdiction over other types of federal reservations. The federal government enjoys jurisdiction, indeed exclusive jurisdiction, over certain federal reservations because the states ceded their jurisdiction over those areas. *See* Evans v. Cornman, 398 U.S. 419, 420 (1970) (Under art. I, § 8, cl. 17 of the United States Constitution, the federal government exercises exclusive jurisdiction where a state cedes to the government such jurisdiction). Federal jurisdiction over Indian reservations did not result from cession of state territorial jurisdiction, however, but derives from the Constitution, art. I, § 8, cl. 3 under Congress' power to regulate commerce with the Indian tribes. Buck Act Hearings, *supra,* at 38 (statement of David Speck, Assistant Solicitor, Department of the Interior). *See also,* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832); Montana v. Blackfeet, 471 U.S. 759 (1985).

store being run by an Indian. . . . " *Buck Act Hearings*, *supra*, at 19. As the Representative clarified, however, even if Indians were the proprietors, he advocated that they remain exempt from state taxation. He stated: "we have no desire to tax the Indians. They are exempt from taxation in our state. . . . " *Id.*

Thus, the evil at which the Hayden-Cartwright Act was aimed was not present on Indian reservations as on governmental reservations. Because Congress contemplated the return of jurisdiction to the States and not the granting of new jurisdiction, the Hayden-Cartwright Act was not meant to grant states any new authority on Indian reservations and certainly did not intend to abrogate Indian tax immunity.

III. ASSUMING THAT CONGRESS DID NOT AUTHORIZE THE STATE TAXATION AT ISSUE HERE IN THE HAYDEN-CARTWRIGHT ACT, PRINCIPLES OF FEDERAL INDIAN PREEMPTION AND TRIBAL SOVEREIGNTY PRECLUDE THE STATE FROM IMPOSING TAXES ON SALES OF MOTOR FUEL BY THE TRIBE WITHIN INDIAN COUNTRY

A. There Is A *Per Se* Rule Against State Jurisdiction To Tax Indians Within Indian Country Absent Explicit Congressional Authorization

This Court has made clear that, absent explicit congressional authorization, states have no jurisdiction to tax tribes or tribal members in Indian country:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n . . . lays to rest any doubt in this respect by

> holding that such taxation is not permissible absent congressional consent.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1985), the Court explained that this prohibition against state taxation of Indians amounted to a *per se* rule. *See also County of Yakima v. Yakima Nation*, 502 U.S. 251, 267 (1992) (reaffirming the *per se* rule against state taxation of Indians absent congressional authorization). This *per se* rule stems from the "deeply rooted" doctrine in federal Indian law that land set aside for Indians is territory over which Indian tribes are self-governing and from which state jurisdiction is generally excluded. *See generally McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168-71 (1973). Indian immunity from state jurisdiction is based on the separate sovereign status of Indian tribes and the ensuing federal-tribal relationship manifested in treaties and other federal law and policy. *Id.* at 168-69.

Here, the State imposes several taxes on gasoline and diesel fuel. *See Chickasaw Nation v. State ex rel. Oklahoma Tax Comm'n*, 31 F.3d. 964, 971 (10th Cir. 1994). State law requires the wholesale distributors to include the motor fuel taxes in the wholesale price and to collect them from the retailer at the time of the wholesale purchase. Okla. Stat. Ann. tit. 68, §§ 502, 502.1, 502.2, 502.3, 502.4, 502.5, 502.6, 502.7, 516, 520, 522 & 522.1 (1992). The Court of Appeals correctly determined that the legal incidence of this motor fuel tax thus falls directly on the retailer, which in this case, is the Tribe.[11] *Chickasaw Nation*, 31 F.3d at 972. Because the tax's legal incidence so falls, the State is directly taxing the Tribe for activities taking place on

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[11] This brief supports affirmance of the Court of Appeal's holding that the incidence of the State's fuel tax falls on the Tribe. However, we reserve extended argument on that point to the Tribe.

tribal trust land. This taxation is forbidden under this Court's *per se* rule. As there is no congressional authorization here, *see* this brief at section II, *supra*, the motor fuel tax should be struck down.

The State suggests that the motor fuel tax is valid even though the tax may fall directly on the Tribe.[12] First, the State argues that even if the legal incidence of the tax falls on the Tribe, applying a conclusive presumption against such taxation would be to follow mere "formalism". *See* Pet. Br. at 14. It instead argues that since the State's interests in imposing the taxes outweigh the Tribe's interests in being free from them, the taxes should be allowed. But, this Court has explicitly stated its desire not to rebalance issues in cases of this kind:

> [T]he federal tradition of Indian immunity from state taxation is very strong and that the state interest is correspondingly weak. Accordingly it is unnecessary to rebalance these issues in every case.

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n.17 (1985). The State's request that this Court deviate from its established rule to determine the validity of the motor fuel tax as applied to the Tribe should be rejected.[13]

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[12] The State concedes that where the Tribe purchases fuel for use in tribally owned vehicles for tribal purposes, state law exempts those purchases from tax. Chickasaw Nation, 31 F.3d at 971. This concession alone does not bring the state taxing scheme into compliance with the *per se* rule, however.

[13] All the cases cited by the State as support for its balancing approach either address situations involving state regulations other than taxation or state taxation of non-Indians. As such, none are on point.

B. The Same *Per Se* Rule Precludes The State From Taxing Sales Of Fuel By The Tribe To Tribal Members

Even if this Court finds that the fuel taxes constitute taxes on the consumer rather than on the retailer, the fuel taxes are invalid at least as applied to sales to tribal members under the *per se* rule. The rule applies with equal force to invalidate state taxation of individual Indians as well as tribes within Indian country. *See, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

Thus, if the legal incidence of the fuel tax is found to fall on the ultimate consumer, where those consumers are tribal members purchasing fuel in Indian country, the State may not tax them absent explicit authorization by Congress. Since no such authorization exists here, the State tax as applied to tribal members is *per se* invalid.[14]

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[14] The State contends that the "extra-reservation" effects of vehicular use warrant its taxation of sales of motor fuel in Indian country even to tribal members. *See* Pet. Br. at 32. In support of its argument, the State relies on three cases: Rice v. Rehner, 463 U.S. 713 (1983); Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S.Ct. 1985 (1993); and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980). However, external effects of the sort suggested by the State have never validated a tax on Indian activities or land within Indian country, and the cited cases lend little support to its argument.

The first case, Rice did not concern taxation of Indians, but rather, regulation of liquor. Significantly, Rice noted that there had been a historical tradition of state regulation of Indians in Indian country "in the narrow context of the regulation of liquor." Rice, 463 U.S. at 723. This Court specifically found that the "spillover" effects *regarding alcohol regulation* "[are]

C. The State Is Precluded From Taxing Sales Of Fuel By The Tribe To Non-Members In Indian Country Because Imposition Of The State Motor Fuel Tax Infringes On The Tribe's Right To Self-Government

States lack jurisdiction to tax activities of non-members within Indian country where such taxation infringes on tribal self-government or is preempted by federal law and policy. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

The test for finding infringement is whether the state law interferes with the right of Indians "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). This test seeks an accommodation between a state's and a tribe's interests by allowing the state to protect its interests "up to the point where tribal self-government would be affected." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 179 (1973).

In *Colville*, the Court suggested that infringement could be found if the state tax interfered with the tribe's right to exercise its regulatory functions. *Id.* at 158. Here, the State's taxation of the Tribes' fuel sales to non-members interferes with the Tribe's ability to regulate within Indian country.[15]

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qualitatively different from any "spillover" effects of income taxes or taxes on cigarettes." *Id.* at 724.

In neither Sac and Fox nor Colville did the Court reach the question whether a state could permissibly tailor a fuel tax to account for vehicle use outside of Indian country. Even assuming *arguendo* that a state could so narrowly tailor its taxes, the record in this case presents no evidence thereof. Save the exemption for tribal use, the State here taxes one hundred percent of motor fuel use by tribal members within or without Indian country.

[15] Should this Court find that the record is not sufficient to show this interference, it should remand for further development on this point. *See, e.g.*, Oklahoma Tax Commission v. Sac and Fox Nation, 113 S.Ct. 1985 (1993).

> The decision to enact certain taxes and not to enact others, and the decision to vary rates and exemptions are highly sophisticated tools which can be used to encourage particular kinds of business activity and property-holding and to discourage other such activity. Tax incentives for the location and operation of industry might be a decision which the state is willing to make in a situation where an Indian tribe might choose to foster collective agricultural economic activity or small cottage industry instead. The taxing decisions made or left unmade by the governmental entity significantly affect the culture, economic development, and collective goals of the people.

Dan Israel and Thomas Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D.L.Rev. 268, 282 (1973).

As the State taxation here would necessarily interfere with the Tribe's right to make decisions regarding taxation within Indian country – and thus its right and practical ability to regulate its own internal economic and social development – the tax should be struck down as infringing on tribal sovereignty.[16]

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[16] A state imposed motor fuel tax would also infringe on tribal sovereignty in a situation where the value of the fuel is generated within Indian country, such as where a tribe produces its own fuel. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). Also, it would infringe where fuel sales are part of a larger economic development project, such as where fuel is sold in connection with a tribally run casino or other tribally run business. In such a case, the tribe would not be merely marketing a tax exemption – such exemption would be merely incidental to the larger economic development project. *Id.*

IV. THE STATE IS BARRED FROM TAXING INCOME EARNED BY TRIBAL MEMBERS FOR WORK DONE FOR THE TRIBE WITHIN INDIAN COUNTRY

A. *McClanahan v. Arizona Tax Commission* Bars State Taxation Of Income Earned Within Indian Country By A Tribally Employed Member Residing Outside Of Indian Country

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), this Court struck down a state tax on the income of a Navajo Indian residing on the Navajo Reservation and earning all of her income within the Reservation boundaries. The Court held that, "[s]ince appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." 411 U.S. at 179, 180. Here, the Indians' income at issue is earned within Indian country, but unlike *McClanahan*, the Indians do not reside within Indian country. However, unlike *McClanahan*, the tribal members are employed by the Tribe.

McClanahan made clear that the rule against state taxation applies only to a tribe that has retained its autonomy and to Indians who have not become assimilated. The Court noted that " . . . the doctrine [of tribal sovereignty] has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community." 411 U.S. at 171.[17]

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[17] The question of assimilation has been important in other contexts as well. In Morton v. Ruiz, the question was:

> whether Congress intended to exclude from the general assistance program these respondents and their class, who are full-blooded, unassimilated Indians living in an Indian community near their native reser-

In *McClanahan*, the evidence that the Indians were not assimilated came from the fact that they resided on the reservation. Here, enrolled tribal members live near Indian country and commute daily to Indian country to work for their tribe.[18] These factors provide the same assurance that they have not been assimilated into the general community as did residence on the reservation in *McClanahan*. *Cf. Morton v. Ruiz*, 415 U.S. 199 (1974). Also, here the members work directly for the tribal government, a factor not present in *McClanahan*.[19] The doctrine of Indian sovereignty should apply with full force here to preclude state taxation on income earned by tribal members living near Indian country and carrying out the sovereign functions of the Tribe within Indian country.[20]

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vation, and who maintain close economic ties with that reservation.

415 U.S. 199, 211 (1974).

This Court concluded from testimony given to Congress that Congress was led to believe that the programs were being made available to those unassimilated needy Indians living near the reservation as well as to those living 'on.'

Id. at 229.

[18] This case is distinguishable from Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) where this Court upheld a state's gross receipts tax on receipts earned by a tribe's ski area operated off the reservation. The income generating activity here occurs within Indian country.

[19] This is not to suggest that McClanahan would not apply where tribal members commuted to non governmental jobs within Indian country. That issue is not before the Court.

[20] Whether or not in the context of dual state taxation states have jurisdiction to tax the income of residents wherever earned, this Court has counseled in White Mountain Apache Tribe v. Bracker against importing notions from the state context into the Indian context:

As noted previously, in the years since *McClanahan* was decided, the Court solidified a *per se* rule against state taxation of Indian activities within Indian country. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). Hence, the Court need not even examine the Tribe's treaty here to see if it expressly forbids state taxation. Assuming *arguendo*, however, that the specific treaty at issue here is relevant, state jurisdiction is nevertheless foreclosed. As the Court of Appeals found, the Tribe's treaty is clear on this point. *Chickasaw Nation*, 31 F.3d. at 978.

B. Even Assuming *Arguendo* That *McClanahan* Does Not Control Here, Imposition Of The Taxes At Issue Is Foreclosed Because It Interferes With The Tribe's Right Of Self Government

In *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S.Ct. 1985 (1993), the Court faced the question presented

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> Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law. . . .

448 U.S. 136, 143 (1980) (citation omitted).

Also, the Court has generally rejected state taxation which imposes an additional burden on a tribal enterprise where it is not "justified by functions or services performed by the State in connection with the on-reservation activity." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983) (citing Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 843 and n.7 (1982)). There is nothing in the record here to indicate that the State performs any services in connection with the functioning of the tribal government.

here, but remanded to the lower courts without resolving the issue. In remanding, the Court expressly left open the question of:

> whether the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country.

113 S.Ct. 1985, 1992.

Here, the burden of state income taxes will directly affect the ability of the Tribe to pay compensation to employees to carry out the government's programs and to attract and keep the most qualified tribal employees as their income will be substantially impacted by the tax paid to the State. The State should not be allowed to tax the operation of the Tribe's government.[21] To do so directly infringes on tribal sovereignty.[22] It also infringes on the rights of the individual members as *McClanahan*, citing *Williams v. Lee* makes clear. "[A]ppellants rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose." 411 U.S. at 181.

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[21] That federal employees pay state income taxes does not affect the inquiry here. As this Court made clear in Ramah Navajo School Board, Inc. v. Bureau of Revenue, different rules apply in the tribal context than apply in the federal context. 458 U.S. 832 (1982). In Ramah, the dissent noted that the same tax allowed on federal projects was disallowed in the tribal context. *Id.* at 856. (Rehnquist, J., dissenting) (citing United States v. New Mexico, 455 U.S. 720, 735 (1982).

[22] Should this Court find that the record is not sufficient to show this interference, it should remand for further development on this point. See note 17, *supra*.

CONCLUSION

For the reasons stated above, the holdings of the Court of Appeals should be affirmed.

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